No. 87-367

In The
Supreme Court of the United States
October Term, 1987

BENDIX AUTOLITE CORPORATION,
Appellant,

-v.-

MIDWESCO ENTERPRISES, INC.,
Appellee.

INTERNATIONAL BOILER WORKS COMPANY,
Third Party Defendant.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF APPELLANT

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THE QUESTIONS PRESENTED

1. Does the Ohio tolling statute (Ohio Rev. Code § 2305.15) impermissibly burden interstate commerce by denying foreign corporations the protection of the statute of limitations during such times as they cannot be served with process within the state?

2. Does the aforesaid tolling statute impermissibly burden commerce with respect to claims arising from contract, for which the tolling of the statute of limitations can be avoided by including in the contract itself a provision authorizing in-state service?

3. Should the decision invalidating the above statute have been given only prospective effect?

THE PARTIES

The plaintiff-appellant in this action is Bendix Autolite Corporation ("Bendix"), which as of March 29, 1985 was merged into The Bendix Corporation and ceased its separate existence. The Bendix Corporation was merged into Allied Corporation ("Allied") on April 1, 1985 and Allied Corporation was merged into Allied-Signal, Inc. on September 30, 1987.*

The defendant/third-party plaintiff-appellee is Midwesco Enterprises, Inc. The third-party defendant is International Boiler Works Company.

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* The subsidiary and affiliated corporations of Allied-Signal Inc. (other than those which are wholly owned) are Akebono Brake Industry Co., Inc. (Japan); Allied-General Nuclear Services (Delaware); Bendix Electronic Service Corporation (Spain); Bendix Group Superannuation Pty., Ltd. (Australia); Bendix Italia, S.p.A. (Italy); Bendix Mintex Proprietary Limited (Australia); Bendix-Jidosha Kiki Corporation (Delaware); Bunker Ramo Electronic Data Systems S.A. (Spain); Chico Corporation (Delaware); Compania Industrial ale Fluoreta, S.A. (Mexico); Compania Metalurgica de Parral, S.A. (Mexico); France Automobile Service, S.A. (France); Garrett Comtronics Licensing Corp. (Texas); Globe Auto Electricals Ltd. (India); Identitech Corporation (Delaware); Iminor, S.A. (France); Industrial Turbines International Inc. (New Jersey); Ingold Electrodes, Inc. (Massachusetts); International Turbine Engine Corporation (Delaware); La Decoration Moderne, S.A. (France); Leaseway All-Services, Inc. (Delaware); Manbritt Industries, Inc. (New York); Mitsuwa Construction Co. (Japan); Nikki-Universal Co., Ltd. (Japan); Nippon Amorphous Metals Co., Ltd. (Japan); Nippon Brake Safety Institute (Japan); Nirlon Synthetic Fibers and Chemicals, Ltd. (India); Normalair Garrett (holdings) Ltd. (United Kingdom); Oak Mitsui Inc. (New York); Prestolite of India Ltd. (India); Quimobasicos, S.A. (Mexico); Propelentes Mexicanos, S.A. (Mexico); Sanzillon-Clichy, S.A. (France); Serind S.p.A. (Italy); Sifra Industrie, S.A. (France); Sistemas Bendix de Seguridad S.A. de C.V. (Mexico); Societe Civile Immobiliere Prieur & Cie (France); Societe Wheelabrator-Allevard S.A. (France); Sofratype, S.A. (France); Sonic Oil Separation, Ltd. (Canada); Synektron Corporation (Oregon); Tecpro Industrial Chemicals Ltd. (United Kingdom); Turbo Services SNC (France); UM Holding B V (Netherlands); UMMS Caribbean N. V. (Aruba); UMP Chemicals, S.A. (United Kingdom); Union Texas Petroleum Holdings, Inc. (Delaware).

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The opinion of the Court of Appeals for the Sixth Circuit affirming the granting of summary judgment dismissing the complaint is reported at 820 F.2d 186 (1987). and included in the appendix to Bendix' Jurisdictional Statement, pp. 1a-6a. The unreported Memorandum and Order of the Federal District Court for the Northern District of Ohio dated March 8, 1984 granting summary judgment dismissing the complaint is included in the Joint Appendix, pp. 19-28. Also included in the Joint Appendix (pp. 31-47) is an unreported decision of the same District Court entered on the same day in the case of *Copley v. Heil-Quaker Corp.*, the two cases having been combined for hearing and argument because of the similarity of the issues presented.

STATEMENT OF JURISDICTIONAL GROUNDS

This is an appeal from a decision by the United States Court of Appeals for the Sixth Circuit declaring a particular statute (the so-called Ohio tolling statute—Ohio Rev. Code Ann. § 2305.15) to be invalid under the Commerce Clause of the United States Constitution.

The statutory basis for jurisdiction is 28 U.S.C. § 1254(2), relating to decisions by a court of appeals holding a state statute to be invalid as repugnant to the United States Constitution.

The Court of Appeals rendered its decision affirming the District Court on June 3, 1987. Notice of appeal was filed on August 26, 1987 in the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES

The decisions of the lower courts were based on Article I, Section 8 of the United States Constitution (the Commerce Clause) giving Congress the power

> . . . to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.

The State statute declared to have been unconstitutional is the Ohio tolling statute, Ohio Rev. Code Ann. § 2305.15 (sometimes referred to as the "Ohio savings clause"), which reads as follows:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

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STATEMENT OF THE CASE

Plaintiff-appellant Bendix in this action seeks to recover damages for breach of contract and fraud arising out of a written agreement under which defendant-appellee Midwesco sold and installed a coal-fired boiler system at Bendix' manufacturing facility in Fostoria, Ohio. This system was placed in service in July 1975 and the action was commenced in December 1980.

Midwesco moved for summary judgment, claiming that Bendix' right of action was barred by the four-year statute of limitations fixed by Ohio Rev. Code Ann. § 1302.98 for contract actions, and by Ohio Rev. Code Ann. § 2305.09 (c) for fraud actions. It was conceded that Midwesco was not authorized to do business in Ohio and had not appointed an agent for the service of process.

By decision and order dated April 27, 1983, the District Court denied Midwesco's motion insofar as it sought to interpret the tolling statute as not applicable because Midwesco was continually subject to the jurisdiction of the Ohio courts through long-arm service. The District Court's holding in that regard has never been appealed and is no longer in issue.

As part of the same decision, however, the court held in abeyance its decision on whether the tolling statute imposed an impermissible burden on commerce or was otherwise unconstitutional, noting that the same issue had also been raised in the case of *Copley v. Heil-Quaker Corp.*, which was then pending before it. The court arranged for the oral argument of both cases in a single hearing.

Thereafter and on March 8, 1987, the District Court rendered decisions in both the present case and the companion *(Copley)* case, in each case dismissing the complaints on the ground that the Ohio tolling statute impermissibly burdened interstate commerce. In both cases appeals were taken to the Court of Appeals for the Sixth Circuit, which affirmed both decisions. The decision in the case of Bendix was rendered on June 3, 1987.

Plaintiff-appellant argued in both the District Court and the Court of Appeals that there was no impermissible burden on commerce, and specifically argued that Midwesco could have avoided the detrimental effect of the tolling statute either by including in its contract with Bendix a provision designating an agent on whom Bendix might serve process for claims related to that particular transaction, or by filing a designation with the Ohio Secretary of State, notwithstanding that it had not qualified to do business in Ohio.

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SUMMARY OF ARGUMENT

In Part I of its argument, Bendix assumes *arguendo* that by reason of the Ohio tolling statute, foreign corporations which engage in Ohio-related interstate commerce must choose between obtaining a license to do business or forfeiting the protection of the statute of limitations. While denying that this would constitute "forced licensure" as contended by the courts below, Bendix distinguishes the Ohio statute from legislation found to unduly burden commerce in other cases, showing that it is not protectionist in nature, does not impede the movement of goods, does not address a subject requiring uniform regulation, and applies evenhandedly to residents and nonresidents alike. Bendix also argues that the local benefits of such a statute, having been recognized in a prior decision of this Court as valid and legitimate, outweigh any incidental or indirect impact on interstate commerce. Much of this argument is devoted to the proposition that because the operation of the Ohio statute is necessarily restricted to Ohio-based litigation, the statute does not pose even a theoretical burden to those entities which are beyond the reach of the Ohio courts on the basis of due process considerations, as such entities will have no occasion for invoking the limitations defense. The continued availability of a laches defense is also noted, as is the fact that the limitations defense has never been regarded as a natural or fundamental right.

Part II of the argument explains why the lower courts were mistaken in treating licensure to do business as the only means for appointing an in-state agent for service and thus avoiding the strictures of the tolling statute. Here it is explained that there were two alternative methods by which Midwesco could have appointed an agent for the service of process, neither of which would have necessitated registering to do business or surrendering to the general jurisdiction of the State. One such method was the private designation of an Ohio-based agent, either as part of the contract on which this action is based or by unilateral declaration, with limited authority to receive process in claims arising from the contract itself. Another method was the public filing of an agency designation, with or without limitations of authority, in the Office of the Ohio Secretary of State under a procedure recognized and approved in a letter signed by a spokesperson for that office and included in the Joint Appendix, pp. 48-49.

Part III argues that any invalidation of the Ohio savings clause should be prospective only in accordance with the non-retroactivity standards promulgated by this Court.

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ARGUMENT

I. THE OHIO STATUTE'S BURDEN ON INTERSTATE COMMERCE, IF IT EXISTS AT ALL, IS NONDISCRIMINATORY, INDIRECT AND NOT EXCESSIVE IN RELATION TO ITS LOCAL BENEFITS.

The impact on interstate commerce of a limitations tolling statute of the sort considered herein has been characterized by a member of this Court as "fairly negligible". (See opinion of Chief Justice (then Justice) Rehnquist, hereinafter discussed in detail, dissenting from this Court's denial of certiorari in *Honda Motor Co. v. Coons*, 469 U.S. 1123, 1126 (1985) (hereinafter "the Honda dissent")).

Furthermore, legitimate state interests for the creation of a limitations tolling statute of the type now represented by the Ohio savings clause were explicitly recognized by this Court in *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), also discussed *infra*.[1]

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[1]The *Searle* case involved a constitutional challenge to a New Jersey statute essentially identical to the Ohio savings clause. This Court upheld the statute insofar as it was contended that by denying certain foreign corporations a statute-of-limitations defense, the state had violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court declined to rule, however, on the issue now squarely presented here, *i.e.*, whether conditioning the limitations defense on the availability of in-state service of process constitutes an impermissible burden on interstate commerce. The Commerce Clause issue was left open partly because the lower (New Jersey) courts had not considered it. *Id.*, 455 U.S. at 413. Another reason was that a majority of the Justices found themselves unable to deter-

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The courts below, prior to the Honda dissent but with full knowledge of this Court's ruling in *Searle*, nevertheless found that the burden on interstate commerce supposedly brought about by the Ohio savings clause rendered it *per se* illegal under the principles established in

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mine from the record whether New Jersey law allowed foreign corporations to appoint in-state agents to receive process by some means other than licensure to do business, a process that would have entailed submission to the jurisdiction of the state for all purposes. *Id.*, at 413-14. This case was accordingly remanded to the Third Circuit Court of Appeals for clarification as to the requirements of New Jersey law in this regard (*id.*, at 414), and was in turn remanded by that court to the United States District Court as part of a consolidated order which also applied to another lawsuit. *Hopkins v. Kelsey-Hayes, Inc.*, 677 F.2d 301, 302 (3d Cir. 1982). The District Court elected to await the resolution of the same issue in a proceeding entitled *Honda Motor Co. v. Coons* which was then pending before the New Jersey Supreme Court in consequence of its having been remanded by this Court (see *Honda Motor Co. v. Coons*, 455 U.S. 996 (1982)) for further consideration in the light of this Court's *Searle decision*. Thereafter, the New Jersey Supreme Court, in *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983) ("*Coons I*"), declared that under New Jersey law, a corporation not organized in that state and not represented there by any person upon whom process may be served can gain the benefit of the statute of limitations only by obtaining a license to do business. *Id.*, 94 N.J. at 315-16, 463 A.2d at 925. The New Jersey court further holding to the effect that the statute as thus interpreted impermissibly burdened interstate commerce is discussed *infra*. This decision in *Coons I* was modified upon petition for rehearing in *Coons v. American Honda Motor Co.*, 96 N.J. 419, 476 A.2d 763 (1984) ("*Coons II*"), by making the invalidation of the tolling statute prospective only and thus of no consequence to the litigants, using the standards enunciated by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Review by this Court of the *Coons I* decision was applied for, but certiorari was denied over the dissenting written opinion of Rehnquist, C. J., as earlier noted and as hereinafter discussed. A more detailed explanation of the intertwined procedural histories of *Searle* and *Coons* appears in *Coons II*, 96 N.J. at 422-24, 476 A.2d at 765-67.

Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Alternatively, the lower courts found that the Ohio statute constituted a burden on commerce which was "clearly excessive in relation to the putative local benefits" on the basis of the balancing test authorized in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[2]

If the courts below had actually analyzed the operation and function of the Ohio savings clause, either in its general application or in relation to the facts in this case, they would have found its supposed burden on commerce to be entirely different in both nature and degree from anything identifiable as a violation of the Commerce Clause on the basis of this Court's prior decisions.

The statute here in issue is not a law that even concerns articles of commerce or the movement of goods, much less one that violates the Commerce Clause because it "overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S. at 624. There is nothing in the nature or history of the statute to suggest a parochial or protectionist purpose of the sort examined in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679-87 (1980) (concurring opinion

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[2]This case raises no issue of federal preemption or inconsistency with federal regulation and thus concerns only the so-called dormant Commerce Clause, under which state actions may be deemed incompatible with the mere existence of the power granted the federal government. See, e.g., *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. —, —, 95 L.Ed.2d 67, 84 (1987); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) ("The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.")

of Brennan, J.), in which one state pitted its own interests against those of its neighbors. Certainly there is no suggestion of any economic protectionism of the sort condemned in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-73 (1984); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 351-53 (1977); or *Philadelphia v. New Jersey*, 437 U.S. at 624-27. Most assuredly, the Ohio savings clause is not a regulation of the sort identifiable as a *per se* Commerce Clause violation because "its effect is to favor in-state economic interests over out-of-state interests", as was explained in *Brown-Forman Distilleries Corp. v. New York State Liquor Authority*, 476 U.S. —, —, 90 L.Ed.2d 552, 559 (1986). If anything, the present statute provides an incentive for both foreign and domestic corporations to remain in competition by continuing their Ohio presence. Whatever detriment the statute may occasion is as likely to be experienced by localized business units which at some point withdraw from Ohio's intrastate commerce as by those which might choose to participate exclusively in interstate commerce, but only if they can do so without providing for in-state service.

The Ohio savings clause must also be sharply distinguished from statutes found to be invalid because they discouraged nonresidents from carrying on a particular trade or business. *E.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 42-44 (1980). *Cf., Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 876-78 (1985).

Perhaps most important is that the Ohio savings clause does not discriminate against interstate commerce, and is thus not among the class of statutes identified in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at —,

95 L.Ed.2d at 84, as "[t]he principal objects of dormant Commerce Clause scrutiny." Such discrimination is properly found, according to this Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 42, if a statute differentiates "among affected business entities according to the extent of their contacts with the local economy". The Ohio savings clause makes no such differentiation, but as the ensuing text will explain in detail, is nondiscriminatory in that it "visits its effects equally upon both interstate and local business", *id.*, 447 U.S. at 36; "regulates evenhandedly to effectuate a legitimate local public interest", *Pike v. Bruce Church, Inc.*, 397 U.S. at 142; and constitutes "a regulation of general application" which is "applicable alike to 'any person, firm or corporation' " within its prescribed ambit, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960). As this Court well knows, "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

It is likewise quite certain that the area of commerce affected by the Ohio statute is not one in which uniformity of regulation is necessary and in which local interference is accordingly not permissible, under the authority of such cases as *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at —, 95 L.Ed.2d at 84; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 444 (1960); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). Statutes of limitations have always represented matters of local concern. While in the case of federally-created causes of

action there are occasional lamentations that Congress should provide uniform periods of limitation more frequently than it does, *e.g.*, *Sentry Corp. v. Harris*, 802 F.2d 229, 246 (7th Cir. 1986), it is doubtful that any such national uniformity has ever been seriously advocated for cases governed by state law.

There are also obvious dissimilarities between the Ohio statute and the type of state statute invalidated by this Court in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), which denied a company engaged solely in interstate commerce the right to enforce its claims in the courts of that state. Here there was no exclusive targeting of nonresidents as such and no attempt to deny an interstate business the rewards of its lawful endeavors. And while access to the courts is a constitutionally protectable right, this Court's *Searle* opinion (455 U.S. at 408) includes the reminder (by quotation from *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)) that the protection of a statute of limitations is not a natural or fundamental right, and exists if at all solely as a matter of legislative grace.

As noted, the existence of valid state interests in wanting claims to be enforceable through in-state service is no longer a matter of argument or debate, having been conclusively established in this Court's *Searle* opinion with respect to the similar New Jersey statute there in question. Rejecting the argument that the advent of long-arm jurisdiction eliminated any legitimate basis for favoring service within the state, this Court found continuing justification in the fact that, "the unrepresented foreign corporation remains potentially difficult to

locate", even though the whereabouts of the prominent defendant in that lawsuit were well known. *Searle*, 455 U.S. at 409-10. Further justification was found in the fact that long-arm service in New Jersey was not "simply an alternative to service within the State", but entailed the additional burden of proving that in-state service could not be effected, and of otherwise demonstrating compliance with the statutory provisions intended to insure due process. The Ohio courts are also vigilant in insuring that long-arm service conforms to the limitations of due process, and that the lawsuit in question falls within one of the statutory categories for which long-arm service is appropriate. *E.g., Busch v. Service Plastics, Inc.*, 261 F. Supp. 136 (N.D. Ohio 1966); *Culp v. Polytechnic Institute*, 7 Ohio App. 3d 352, 455 N.E.2d 698 (1982).

That the *Searle* holding was limited to due process and equal protection issues does not affect its precedential value in this regard, since the existence of a legitimate state interest does not become a different issue merely because it now arises in a Commerce Clause setting.[3]

In examining the supposed burden on interstate commerce, it should be recognized at the outset that a significant and presumably sizeable portion of that commerce, even if it were to be transacted with persons located in Ohio and even if it were to generate lawsuits based on events occurring in that jurisdiction, remains totally unaffected by the Ohio statute. This situation exists simply

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[3]This is not to suggest that matters concerning the operation or significance of a state interest (as opposed to the existence thereof) present the same issue regardless of whether they arise in a commerce clause or equal protection context. This Court noted the contrary in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 876 n.6 (1985).

because the interstate participants, being beyond the reach of the Ohio courts, have no need for the protection of an Ohio statute of limitations. This immunity from Ohio jurisdiction does not result from any forbearance by the state of Ohio in the assertion of long-arm jurisdiction. It exists instead simply because it is still possible under the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and despite the progressive expansion of state extraterritorial jurisdiction noted in *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-23 (1957), to engage in Ohio-related activities and to spawn Ohio-related lawsuits without becoming subject to the general jurisdiction of that State, and in some instances without becoming subject to even a limited jurisdiction over matters arising from specific contacts with the particular state.

Thus in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), this Court refused to countenance a state's assumption of jurisdiction where the locality in question was not part of the market regularly served by the defendant manufacturer, and was connected to the defendant only on the basis of an isolated occurrence involving one of its products. More recently, this Court in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), in holding that a publisher charged with libel was subject to New Hampshire jurisdiction because its magazines were sold there, stressed that the publisher had "continuously and deliberately exploited the New Hampshire market". *Id.*, 465 U.S. at 781. And despite the continuous nature of the publisher's New Hampshire dealings, this Court took pains to observe, "respondent's activities in the forum may not be so substantial as to support jurisdiction over a

cause of action unrelated to those activities." *Id.*, 465 U.S. at 779. More recently, this Court in *Asahi Metal Industry Co. v. Superior Court of Solano County*, 480 U.S. —, —, 94 L.Ed.2d 92, 104 (1987), further extended the protection of the Due Process Clause in this regard by declaring that the "minimum contacts" rule could not be satisfied by the defendant's mere "awareness that the stream of commerce may or will sweep the product into the forum state".

A recent example of a case in which the "minimum contacts" standard of *International Shoe* and its progeny barred the assertion of personal jurisdiction is *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651 (8th Cir. 1982). In that case there were express findings that the defendant had been transacting business within the forum state (*id.*, 677 F.2d at 653), that service of process had been effected in full compliance with the state's requirements for long-arm service, and that the transaction in question (a contract to produce animal feed which was fully performed in that same jurisdiction) was also the subject matter of the lawsuit. Nevertheless, the totality of the defendant's contacts with the jurisdiction in question was insufficient to satisfy the due process requirement.

It is thus apparent that the total population of individuals and firms falling within the coverage of the Ohio savings clause may be divided into three separate categories, and that only one of these categories involves even a theoretical impact on interstate commerce. The categories are as follows:

> I. *Intrastate actors not servable in Ohio.* This category encompasses all potential defendants who incurred liability on the basis of purely intrastate activity but ceased to be servable within the State, in most instances because they left the jurisdiction. Included, therefore, are all former residents and former sojourners, including domesticated foreign corporations which have abandoned their intrastate activities. Also included are all current residents whose whereabouts are unknown.
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> II. *Interstate actors beyond the reach of the Ohio courts on due process grounds.* This category is reserved for those persons and firms who became liable to Ohio citizens on the basis of some interstate transaction or event and could be sued if they were present within the state, but whose actual contacts with Ohio are insufficient for the assertion of personal jurisdiction through long-arm service of process.
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> III. *Interstate actors subject to Ohio's long-arm jurisdiction.* This category is comprised of entities potentially liable to Ohio citizens on the basis of interstate transactions or events forming part of a systematic and regular course of dealing with that jurisdiction or otherwise constituting the "minimum contacts" necessary for the attachment of personal jurisdiction.

In examining these categories, it is quickly apparent that while the literal language of the Ohio savings clause applies equally to all of them, any concern with the clause's potential burden on interstate commerce is necessarily confined to Category No. III. Category I is eliminated because it involves only Ohio's own intrastate commerce. Category II is eliminated because only those entities which are subject to Ohio jurisdiction need worry about protection from its statute of limitations.

Of particular importance, especially when examining the Ohio statute for some sign of discrimination against interstate commerce, is the lack of any basis in the present record for measuring or quantifying the membership of

the different categories or determining their relative importance, either in numbers or in economic effect. It would be the purest speculation, for example, to suppose that the segment of interstate commerce having the potential to be adversely affected by the savings clause is as large or larger than that segment which, by reason of due process considerations, is beyond the reach of the Ohio courts. There is likewise nothing in the present record to suggest that the Category I membership, made up of Ohio expatriates, former sojourners and unlocatable residents, is not as large or larger than either of the two remaining categories, or both of them combined.

It is also apparent that the Category III defendants, simply by making themselves vulnerable to lawsuits in the forum jurisdiction, have already accepted a larger burden on their interstate dealings than anything to be apprehended by reason of the Ohio savings clause. This Court in *World-Wide Volkswagen*, 444 U.S. at 297, and again in *Asahi Metal Industry Co. v. Superior Court of Solano County*, 480 U.S. at —, 94 L.Ed.2d at 103, clearly acknowledged that exposure to away-from-home lawsuits on the basis of the "minimum contacts" rule might discourage interstate commerce by prompting particular business firms to discontinue those activities which served to connect them with the forum state. This Court nevertheless recognized that whenever forum-state jurisdiction is warranted on the basis of legitimate state interests and compatible with due process, the affected companies must simply accept the resultant burden on their interstate activities as an appropriate cost of doing business. The relevant text reads as follows:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," Hanson v. Denckla, 357 US, at 253, 2 L Ed 2d 1283, 78 S Ct 1228, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297; *Asahi Metal Industry Co. v. Superior Court of Solano County*, 480 U.S. at —, 94 L.Ed.2d at 103.

For purposes of the due process issues under consideration in the *World-Wide Volkswagen* and *Asahi* cases, it was thus considered sufficient that those business entities who were amenable to a state's long-arm jurisdiction knew what their exposure was and could protect themselves accordingly. The main point to be made here is that the class of business entities to whom those comments were addressed, *i.e.*, entities subject to forum-state jurisdiction on the basis of interstate activities, is exactly the same class of entities whose interstate activities were supposed by the courts below to be impermissibly burdened by denying them the protection of a statute of limitations. It must also be appreciated that the claims which might benefit from time extensions allowable under the savings clause are not new claims, but are part of the very same potential liability which the companies in question were expected to guard against by adjusting their price structures, procuring insurance or restricting their activities, all as noted in *World-Wide Volkswagen* and *Asahi*. The only alteration brought about by the Ohio savings clause is that such claims as might otherwise have been time-barred must now be defended on their merits, except to the extent

that they are also barred by the doctrine of laches. The incremental burden on interstate commerce thus resulting from the savings clause, while conceptually identifiable, seems certain to be virtually microscopic in relation to the burden already accruing from exposure to extraterritorial service.

Also adding to the complexity of proving a burden on commerce is the near impossibility of showing that individual late-filed claims—meaning claims that would have been untimely but for the beneficence of the savings clause—would not have been filed sooner if the additional time had not been provided. Midwesco's thus-far successful avoidance of the present claim proves nothing in this regard, since no future defendant will ever again be given the surprise advantage of a retroactive nullification of a presumptively valid statute, thereby altering the ground rules in the middle of the contest.

There would appear to be only a minuscule burden on commerce, therefore, even if the lower courts were correct in declaring (contrary to the position urged by Bendix in Part II *infra*) that under Ohio law, a foreign corporation can secure the protection of a statute of limitations only by procuring a license to do business in that State. Even as so interpreted, the Ohio statute would provide only a comparatively gentle inducement for obtaining a license, and would lack the coercive power of statutes of the type examined in cases such as *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 291 (1921), making licensure a condition of doing interstate business within the state. Here, whatever cost savings may be achievable through appointment of an in-state agent would appear to be too

elusive and far too speculative to permit the argument that the savings clause, while merely permissive on its face, is coercive in its practical effect. Certainly there has not been the slightest demonstration that the statute has in fact induced any foreign corporations either to become licensed or to withdraw from Ohio-related interstate commerce.

In reaching their contrary conclusions in the decisions rendered below, the lower courts relied heavily on the decision of the New Jersey Supreme Court in *Coons I*, 94 N.J. at 316-18, 463 A.2d at 926-27, which by a four-to-three majority of its justices ruled that a similar New Jersey savings statute (the same statute which this Court upheld against due process/equal protection attack in the *Searle* case) was a *per se* violation of the Commerce Clause, being tantamount to forced licensure of the sort condemned in *Allenberg Cotton Co. v. Pittman*, *Dahnke-Walker Milling Co. v. Bondurant*, and *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). The four-justice majority in *Coons I* concluded as follows:

> The legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

94 N.J. at 318, 463 A.2d at 927.

Nothing Bendix might say in criticism of the New Jersey Supreme Court's reasoning in *Coons I* could demolish it as effectively as the opinion of Chief Justice Rehnquist

in the Honda dissent, culminating in his conclusion that "The impact on interstate commerce here is fairly negligible". *Honda Motor Co.*, 469 U.S. at 1126. Noting that the New Jersey court was purporting to rely on the precedents furnished by this Court in the *Allenberg Cotton* and *Sioux Remedy* cases, the Honda dissent distinguished those cases on the basis of the comparative severity of the sanctions at issue therein, which "totally barred foreign corporations from the state courts", in contrast to the New Jersey law's mere tolling of the statute of limitations. *Id.*, 469 U.S. at 1125. The Honda dissent also stressed the continued availability of the defense of laches as previously observed by this Court in *Searle*, 455 U.S. at 411 (Honda dissent, 469 U.S. at 1126).[4] The Honda dissent also included a reminder that the shelter of statutes of limitation "has never been a fundamental or natural right", noting that the proposition had been reaffirmed in *Searle* and elsewhere. *Id.*, at 1126.

The Honda dissent also faulted the New Jersey court because it "provided little discussion of why interstate commerce would actually be impeded by tolling a statute of limitations, subject to a laches defense, against an absent defendant not represented in the State." 469 U.S. at 1126. This criticism applies with equal force to the decisions of the lower courts in this proceeding.

This Court has previously demonstrated its awareness of recent scholarly commentaries on how the federal courts

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[4]The doctrine of laches, it should be noted, is fully operative in Ohio. See *Thirty-Four Corp. v. Sixty-Seven Corp.*, 15 Ohio St. 3d 350, 352-53, 474 N.E.2d 295, 297-98 (1984); *Connin v. Bailey*, 15 Ohio St. 3d 34, 35, 474 N.E.2d 328, 329 (1984).

should conduct themselves in cases arising under the dormant Commerce Clause and why the balancing test of *Pike v. Bruce Church, Inc.* is not appropriate. One such commentary, Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982), proposes "a radically diminished role for both the dormant commerce clause and the Court as its interpreter" (*id.* at 428) and would abandon the concepts of free trade and anti-protectionism as legitimate objectives of Commerce Clause enforcement. A more recent article was very favorably noticed by Justice Scalia in his concurring opinion in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at —, 95 L.Ed.2d at 89, and argues for limiting judicial inquiry to the existence or nonexistence of a protectionist purpose. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986). As earlier noted, no such purpose is to be found in the facts presented here.[5]

In any event, the *Pike* balancing starts by presuming the validity of the state statute, which "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 36-37; *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. Here the state interests are genuine and compelling, while the supposed

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[5]Likewise absent from the case *sub judice*, as previously noted, is any basis for concluding that the Ohio savings clause discriminates against interstate commerce or poses an impermissible risk of inconsistent regulation by different states, which presumably ends the matter under Justice Scalia's own recommended alternative to the balancing test as set out in the same concurring opinion.

burden on commerce is a largely theoretical construct, having no tactility or substance.

The finding of an impermissible burden on commerce, therefore, should be reversed.

II. BY EITHER OF TWO SEPARATE METHODS, MIDWESCO COULD HAVE APPOINTED AN OHIO AGENT FOR SERVICE WITHOUT SUBJECTING ITSELF TO OHIO JURISDICTION FOR ALL PURPOSES.

The lower courts' approach to the pertinent workings of the Ohio State Government was in stark contrast to this Court's handling of the identical issues in *Searle*. In *Searle*, as previously noted, the majority considered it inappropriate to decide the burden-on-commerce issue without authoritative information on the means available under New Jersey practice for avoiding the adverse consequences of the limitations tolling statute. Was it possible, this Court wanted to know, for a foreign corporation to satisfy the New Jersey tolling statute simply by appointing an agent "in some manner unexplained to us", and without obtaining a license to do business? *Id.*, 455 U.S. at 414. The case was accordingly remanded to ascertain the actual requirements of New Jersey law in this regard.

The District Court in this case, however, with only a motion for summary judgment before it and with no opportunity for resolving disputed factual issues, proceeded to final determination despite a strong showing that the alternative appointment procedures which this Court merely suspected might exist in New Jersey actually did exist in Ohio. The facts and circumstances in this regard

are set out below with specific reference to the two alternative methods for agency appointment which were available to Midwesco in its dealings with Bendix, and which will now be separately examined.

A. The appointment of an agent for service could have been included in the contract on which this action is based.

Because this was a contract claim and not a tort claim of the sort presented in this Court's *Searle* decision and New Jersey's *Coons* decisions, Bendix has consistently argued that Midwesco could have obviated whatever burden on commerce might otherwise have existed simply by appointing an agent for service in the contract itself. A unilateral declaration by Midwesco outside of the contract would presumably have had the same effect.

Midwesco has responded by correctly observing that no such appointment was actually made. All that this means, however, is that any ensuing burden on commerce resulted not from the savings clause, but from the failure to make the appointment.

The Court of Appeals below gave a different and more perplexing response, limited to the following sentence:

> While we acknowledge that Midwesco could have chosen to name an agent as part of its contract with Bendix, this fact alone in no way solves the problem of whether the tolling statute violates the commerce clause.

820 F.2d at 189.

While the Court of Appeals' meaning is not altogether clear, it may have been suggesting that in passing on the constitutionality of a statute, a court must consider how

it applies generally or in various circumstances, and not solely as it relates to the party raising the constitutional challenge. If such was intended, the Court of Appeals was plainly wrong, the correct rule having been declared by this Court in *County Court v. Allen*, 442 U.S. 140 (1979), subject to stated exceptions not applicable here:

> A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

442 U.S. at 154-55.

If, on the other hand, the Court of Appeals was conceding only the hypothetical existence of an appointment clause but denying its effectiveness, either in general or for purposes of the tolling statute, that too was error.

Rule 4.2(6) of the Ohio Rules of Civil Procedure identifies those persons who are authorized to receive process on behalf of a corporation. It permits service upon a domestic or foreign corporation by "serving the agent authorized by appointment or by law to receive service of process". On its face, this rule gives a corporation the choice of appointing an agent by simple non-statutory designation as part of a contract or otherwise, or by designating an agent in accordance with the provisions of the Ohio Foreign Corporations Law, Ohio Rev. Code § 1703.

The Ohio Rules of Civil Procedure were adopted in 1970 and are modeled on the Federal Rules. Cases interpreting the Federal Rules are often used by Ohio courts to explicate the Ohio rules. *E.g., Maryhew v. Yova*, 11 Ohio

St. 3d 154, 464 N.E.2d 538 (1984); *Willoughby Hills v. Cincinnati Insurance Co.*, 9 Ohio St. 3d 177, 459 N.E.2d 555 (1984). Recently an Ohio appellate court relied on federal precedent to interpret Ohio Rule 4. *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E.2d 1344 (1983); *see* 1 Jacoby, *Ohio Civil Practice*, at 31. The federal analog of Ohio Rule 4.2(6) is Fed.R.Civ.P. 4(d)(3), which also permits process to be served on a corporation by serving an agent "authorized by appointment or by law" to receive process.

Under Fed.R.Civ.P. 4, there is no doubt that a corporation can appoint an agent to receive process as part of its business dealings with another party. *Kenny Construction Co. v. Allen*, 248 F.2d 656 (D.C. Cir. 1957); *National Acceptance Co. v. Wechsler*, 489 F. Supp. 642 (N.D. Ill. 1980); *Apex Pool Equipment Corp. v. Venetian Pools Inc.*, 52 F.R.D. 48 (S.D.N.Y. 1971); *Emerson Radio & Phonograph Corp. v. Callander Distributor Corp.*, 116 F. Supp. 926 (S.D.N.Y. 1953). The law in this regard was expressed as follows in 2 *Moore's Federal Practice*, ¶ 4.12:

> Appointment of an agent to receive service of process may be accomplished by contract, and it has been held that the parties to a contract may agree that a third person shall be the agent for receipt of process in actions arising out of the contract.

Id., at 4-139.

Furthermore, a contractual appointment of an agent for service will be recognized even if there has been no formal registration with the state. *Trueblood v. Grayson Shops*, 32 F.R.D. 190, 194 (E.D. Va. 1963). There is no basis for doubting, moreover, that whatever limits are imposed on the agent's authority will be respected by the courts. See *Osterling v. Commonwealth Trust Co.*, 35 F.

Supp. 704 (W.D. Pa.), *aff'd*, 155 F.2d 809 (3d Cir. 1940). *Compare with Kenny Construction Co. v. Allen*, 248 F.2d at 658 (service held to be within the agent's authority, the court adding, "it would have been simple and easy for [the defendant] to have said in the contract that the agent was appointed only for purposes of actions brought by the other party to the contract").

The language of the Ohio Rule and the cases interpreting the identical language of the Federal Rule make it clear that Midwesco, either by inserting an appropriate provision in its contract with Bendix or by simple notice to Bendix at any other time, could have appointed an agent to receive process in Ohio for any dispute that might have arisen between the parties. It would also appear to be immaterial for purposes of the Ohio tolling statute if the appointment in question was not co-extensive in operation and scope with the designation made as part of the qualification process, or that it differed from such a designation in that it was not part of a public record.

Such an appointment in this instance, therefore, need not have entailed any exposure by Midwesco to the general jurisdiction of the Ohio courts. It should also be emphasized that such an appointment would not have added to Midwesco's existing jurisdictional exposure even for the individual claim here asserted by Bendix: That claim was always enforceable through Ohio long-arm service, since Midwesco not only sold the boiler system but actually installed it on Bendix' Ohio premises.

Agency designation by contract, therefore, was not only available but would have completely obviated the alleged burden on commerce.

B. A properly tendered agency appointment would have been accepted for filing by the Ohio Secretary of State and treated as public notice.

The Court of Appeals below essentially disregarded the teaching of the *Searle* case and failed to recognize that if a means in fact existed for a foreign corporation to appoint an agent for service of process without becoming subject to the general jurisdiction of the State, the burden-on-commerce argument would almost certainly disappear.

There are concededly no statutes or published regulations specifically authorizing the public filing of agency appointments apart from the registration process. There is, however, a general provision authorizing the filing of miscellaneous documents which appears in the Ohio statutes as Ohio Rev. Code Ann. § 111.6 and reads in pertinent part as follows:

> The Secretary of State shall charge and collect, for the benefit of the state, the following fees:
>
> * * *
>
> (H) For filing any certificate or paper not required to be recorded, the sum of five dollars.

Both sides in the companion *Copley* case, apparently recognizing that a declaration from the Ohio Secretary of State's office would be the best evidence of the actual practices and official policies there in effect, sought and obtained written statements from the Corporations Counsel serving as a spokesperson for that office on the subject of the treatment to be given to such agency appointments as might be tendered for public filing. Since there was only a single combined hearing on the Commerce Clause issues in both *Copley* and the present case, Bendix

assumed that the letters received from the Secretary of State's office were part of a common record and so argued in the Court of Appeals when Midwesco sought to exclude them. While it appears that the Court of Appeals in fact considered these letters, it obviously gave little weight to their contents.

The first of these statements, a letter to counsel for defendant in the *Copley* case dated September 14, 1983, appears to deny the possibility of an agency designation by means of a public filing apart from the registration process. (J.A. 50.) A very different message, however, was subsequently supplied by the same spokesperson to counsel for the *Copley* plaintiffs by letter dated December 22, 1983. (J.A. 48-49.) That letter includes the following rather guarded message:

> If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

Inconclusive as this letter may be on the subject of what "investigation" is required and who performs it, the letter at the very least confirmed that there were factual issues as to what residual burden might exist and what additional effort, if any, might be required of the designating party. Nevertheless, the Court of Appeals dismissed the entire subject of the referenced alternative filing procedure in the following single sentence:

> With regard to Bendix's suggestion that a corporation may merely notify the Secretary of State of its designated representative, we note simply that this argument is highly speculative and devoid of any statutory support.

820 F.2d at 189.

Part of the problem, therefore, was that the Court of Appeals seemingly regarded the alternative filing issue as a mere argument which Bendix failed to carry, instead of a factual issue as to which Midwesco, not Bendix, bore the full burden of proof. The issue was presented only because Midwesco had undertaken to prove the unconstitutionality of the tolling statute. It was obviously beyond the power of either party, moreover, to improve or clarify the Corporations Counsel's letter without examining representatives of that office, which would obviously have required an evidentiary hearing.

In declaring that the claimed alternative filing procedure was "devoid of any statutory support", the Court of Appeals appeared to be adopting the reasoning of the District Court in the *Copley* case. The decision in the latter case, in refusing to recognize any such procedure, commented in part as follows:

> Any scheme which would permit a corporation to engage solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature.

(J.A. 42.)

While a carefully drafted statute would no doubt have contributed clarity and certainty to official State policy on the matter at issue, it scarcely follows that the practices and policies actually in effect at the Secretary of State's office were irrelevant or lacked legal significance. One senses that the lower courts were influenced not by the difficulties of ascertaining State policy, but by their own

preferences as to how the policy should have been established.

While the Court in *Celotex Corp. v. Catrett*, 477 U.S. —, 91 L.Ed.2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. —, 91 L.Ed.2d 202 (1986), has unquestionably given increased impetus for the dismissal of actions via summary judgment, there is nothing in those decisions to justify the court's rejection of the December 22, 1983 letter from the Secretary of State's office or the refusal to recognize its import. The only decision consistent with the message contained in that letter would have been in favor of the position advocated by Bendix. To the extent that the letter was deemed incomplete or inconclusive, the court should have denied summary judgment and conducted an evidentiary hearing to resolve the issue.

III. THE OHIO TOLLING STATUTE, EVEN IF IT HAD BEEN UNCONSTITUTIONAL, SHOULD NOT HAVE BEEN INVALIDATED RETROACTIVELY

A key issue in deciding whether an unconstitutional statute should be invalidated retroactively, according to the ruling of this Court made in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), and reaffirmed in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 88 (1982), is whether the ruling in question was "foreshadowed by earlier cases."

The earliest hint that there was even an issue of possible tension between the Commerce Clause and a tolling statute of the sort considered herein was this Court's *Searle* decision, rendered in 1982. The present lawsuit had already been commenced in December 1980.

The only cases involving tolling statutes which were available for the guidance of the District Court below, and which it in fact relied upon for its finding of unconstitutionality, were both 1983 decisions: *Coons I* and a case involving an Idaho tolling statute, *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (D. Idaho 1983).

So far as is known, therefore, there was nothing to suggest to Bendix, at or near the expiration of the conventional four-year statute of limitations (probably on or about July 3, 1979), that it would be prudent not to rely on the tolling statute and to institute suit immediately.

The familiar three-part test for resolving questions of retroactivity was expressed as follows in this Court's *Northern Pipeline* decision:

> 1. [W]hether the holding in question decided an issue of first impression whose resolution was not clearly foreshadowed by earlier cases.
>
> 2. [W]hether retrospective operation of the holding will further or retard [the rule's] operation.
>
> 3. [W]hether retroactive application could produce substantial inequitable results.

Id., 458 U.S. at 88 (quoting *Chevron Oil Co. v. Huson*, 404 U.S. at 106).

It seems apparent on the basis of these principles that decisions which serve to shorten a period of limitation for the commencement of a lawsuit are in most instances singularly inappropriate for retroactive application. See, *e.g.*, *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984); *Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342, 347 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

It is assumed, therefore, that the only impediment to the achievement of a just and fair result in this regard is the Court of Appeals' refusal to consider the matter because the issue was raised only in Bendix' reply brief. 820 F.2d at 189.

Bendix must candidly acknowledge that it was forcefully made aware of the retroactivity issue by the New Jersey Supreme Court's ruling in *Coons II*, which was published in the Atlantic Reporter Advance Sheets on July 27, 1984. This was subsequent to Bendix' main brief to the Court of Appeals, which is dated July 16, 1984. In the *Coons II* decision, as previously noted, the New Jersey Supreme Court reconsidered its ruling in *Coons I* and changed it by making the decision prospective only, largely on the basis of this Court's *Chevron Oil* test and the reasonableness of the plaintiff's reliance on the prior law.

—o—

CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded to the District Court for further proceedings.

Respectfully submitted,

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